Supreme Court, U. S.
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No. 77-18

In the Supreme Court of the United States

October Term, 1977

No. 77-18

Guy Osceola, appellant

v.

Jerome K. Kuykendall, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(4) of the Rules of this Court, Appellant opposes the Motion to Dismiss or Affirm, but joins with Appellees in requesting that the case be remanded for entry of a fresh order from which a timely appeal could be taken to the Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction of this appeal pursuant to 28 U.S.C. 1253?

2. Is this case moot?

ARGUMENT

Appellees' argument that the court below did not reach the "constitutional merits of the claim" is a reasonable interpretation of the opinion below, and Appellant has no objection to Appellees' recommendation that this case be remanded for entry of a fresh order to permit timely appeal to the Court of Appeals.

This case is not moot, because there has been no payment of the challenged award.

1. Appellees argue that the district court declined to reach the merits of the constitutional claims and that, therefore, appeal may be taken only to the Court of Appeals.

(Motion to Dismiss or Affirm, p.7) MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). In Appellant's view, the district court did reach the merits of the consitutional claim. The opinion below appears to be open to both interpretations.

The district court found that the judgment of the Commission pursuant to the challenged statute will not affect Appellant's right of possession and occupancy, thus finding the statute free of constitutional defect. The Court wrote:

> Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment. (J.S. App. A-16)

This was a determination, as a matter of law, of the legal effect of a judgment under the statute, and it was, thus, a decision on the merits of the constitutional attack upon the

statute. The court found the Appellant's claim to be premature only because the court interpreted the statute as not affecting his present rights. The Appellant claimed, on the contrary, that the statute and the Commission's judgment will, upon payment, impair his rights.

Nevertheless, the reading of the opinion below urged by Appellees is not unreasonable. The focus of the district court's opinion is upon the nature of Appellant's right rather than upon the operation and constitutionality of the statute. Appellees argue with some reason that this Court's decisions in MTM, Inc. v. Baxley, 420 U.S. 799 (1975), and Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974), be interpreted broadly and applied to preclude direct appeal in cases such as this.

Appellant has no objection to the Appellees' recommendation that this case be remanded for entry of a fresh order to permit a timely appeal to

the Court of Appeals. (Motion to Dismiss or Affirm, p.8) Such a disposition would be fair and consistent with the considerations and policies enunciated in MTM and Gonzalez, supra, particularly in light of the repeal of the three-judge court statute under which this action was brought. Act of August 12, 1976, P.L. 94-381, 90 Stat. 1119, repealing 28 U.S.C. 2281 and 2282. This was the disposition made in MTM, Inc. v. Baxley, supra. Moreover, full consideration of these issues by the Court of Appeals may elucidate and clarify the issues or obviate the need for ultimate consideration by this Court.

2. This case is not moot. Appellees argue that this case is moot because final judgment has been entered by the Indian Claims Commission. Congress has appropriated funds to pay the judgment and the appropriated funds have been deposited in the United States Treasury for

distribution. (Motion to Dismiss or Affirm, p.8) However, the harm which Appellant seeks to avoid by an action for injunctive and declaratory relief is the res judicata effect of a judgment of the Indian Claims Commission. 25 U.S.C. 70u provides:

> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

Thus, although the Commission has entered final judgment, this case is not moot because the res judicata bar which Appellant seeks to avoid is not effective until the award has been paid. The district court below in denying a temporary restraining order concluded as a matter of law that ..."no harm can come to plaintiff until the date of payment..." Osceola v. Kuykendall, et al. Findings of Fact and Conclusions of Law, filed April 7, 1976.

The payment, which brings the res judicata provision into effect, has not occurred. The definition of the term, "payment," has five elements: (1) the discharge of an obligation (2) by an actual or constructive delivery (3) of the money by the debtor to the creditor (4) for the purpose of extinguishing an obligation (5) with acceptance as such by the creditor. See, Sokoloff v. National City Bank of New York, 224 N.Y.S. 102 (1927). Acceptance occurs when control over the money shifts from the debtor to the creditor. Group v. State National Bank of St. Louis, 76 F.2d 726 (8th Cir., 1935).

Applying this definition to this case, payment of the award has not occurred. The appropriated money is currently under the control of the United States and has not passed to the petitioners in the Indian Claims Commission proceeding. Because payment has not occurred, the district court had the power to prevent

harm to Appellant's interest in the land which was the subject of the Indian Claims Commission proceeding.

In any event, the question of mootness is an issue which could best be resolved after full briefing and consideration by the Court of Appeals. The issue of mootness was not raised before the district court.

Conclusion

The Motion to Dismiss or Affirm should be denied. Appellant joins in Appellees' alternative request that this case be remanded for entry of a fresh order in order to permit a timely appeal to the Court of Appeals.

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